Petition

81-1424

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NO.

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ROBERT HUGH CARNEY,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

* * * * * * * * * * * * *

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

* * * * * * * * * * * * *

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ATTORNEYS FOR PETITIONERS

QUESTIONS PRESENTED

1. Whether the petitioner was denied the most basic right to a trial by fair and impartial jury when an unauthorized manifestly prejudicial conversation was held between an unknown third party and a petit juror while the case was being deliberated but before any verdicts were announced.

2. Whether the provisions of 28 U.S.C.A. Sec. 753 (Court Reporter's Act) were violated to the specific prejudice of the petitioner.

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Cases:

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Turner v. Louisiana, 379 U.S. 466, 85 S. Ct. 546, 13 Led. 2d 424 (1965)

Parker v. Gladden, 385 U.S. 363, 87 S. Ct. 468, 17 Led. 2d. 420 (1966)

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Stomack v. Texas, 548 F. 2d 588 (1977)

U. S. v. Howard, 506 F. 2d 865 (1975)

United States v. Long, 419 F. 2d. 9, (1969)

United States v. Smith, 591 F. 2d. 1105 (1979)

United States v. Brumley, 560 F. 2d. 1281 28 U.S.C. 753

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

* * * * * * * * * * * * *

Petitioner, Robert Hugh Carney prays that a Writ of Certiorari issued to review the judgment of the United States Court of Appeals, Eleventh Circuit, entered December 1, 1981, affirming his conviction under 18 U.S.C.A. 2313 and/or 18 U.S.C.A. as charged in the indictment, and that on hearing the judgment of conviction be reversed.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (app. A., infra., p.1a.) has been reported and is included herewith.

JURISDICTION

The judgment of the United States Court of Appeals was entered on December 1, 1981. A Stay of Mandate pending possible review by this court was granted until January 25, 1982.

This Court has jurisdiction under 28 U.S. C., Paragraph 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth and Fourteenth Amendments to the

Constitution of the United States and 28 U.S.C.A. Sec. 753.

STATEMENT OF THE CASE

The petitioner along with one Charles Gault was allegedly involved in the theft and utilization of certain vehicles stolen from January 23, 1979, until approximately April of 1979. In most instances, a Government Witness named Billy Joe Benton stole the vehicles from either Atlanta, Georgia or its surrounding environs and brought to Boaz, Alabama, when, with the supposed active knowledge and participation of the defendant, the cars were dissambled and parts therefrom placed on similar vehicles furnished by the petitioner and others to another Govennment Witness, named Delmas Wayne Holcomb, who ran a car repair body shop in Boaz. Later, the composite more valuable vehicles were sold at auction by the petitioner and his associate. On another accasion, the petitioner averredly brought, himself, a vehicle stolen in Tennessee to Holcomb for the same purpose.

While the government contended that during the period in question Holcombe was working "undercover" for the Federal Bureau of Investigation and the theft

and use of parts from the Georgia and Tennessee cars were part of a criminal scheme, the petitioner contended that he simply furnished cars to Holcomb to be refurbished and sold at auction for a profit but not knowing that he was using stolen parts for that purpose.

Following these occurrences, the petitioner and his business partner Charles Gault was arrested and charged in Fourteen Counts with either receiving or transporting stolen vehicles in violation of U.S.C.A. Sec. 2312 and ~~or~~ 2313. After a trial by jury, the petitioner was found innocent as to counts 2 and 8 of the indictment but otherwise guilty as charged.

Petitioner's basic contentions on appeal were based on the fact that firstly the jury deliberated for portions of two days with one intervening night. During the night, a juror with an unlisted phone number was contacted by a call in which a purported bribe offer was made if the co-defendant was acquitted and that fact was somehow communicated to the other jurors and moreover another juror admitted to pursuing some independent investigation during the deliberative process and garnering of actual information thereby.

Secondly, although a large portion of the government's case was predicated upon the use of tape-

recorded conversations, the admissibility of which in whole or part was hotly contested, the court reporter failed to record the tapes as they were played to the jury as he is required by law to do and thereby stripping the petitioner of this ability to successfully appeal from believed adverse rulings of the trial court with respect thereto.

REASONS FOR GRANTING THE WRIT

The first reason for granting the writ is believed by the petitioner to be of paramount constitutional significance. If the Sixth Amendment to the Constitution is to have any meaning in the Eleventh Circuit whatever, then when there is evidence of impermissible contact with a juror, whether initiated by him or another, and this contact takes place during the deliberative process, but prior to a verdict being announced and it is unquestionally prejudicial to the accused, no such verdict can be allowed to stand.

It is unquestioned that a juror thought he was offered a bribe to acquit one of the two defendants who was the partner of the accused in practically all of the allegedly illegal transactions. The Eleventh Circuit acknowledged that when there is evidence of any impermissible contact with the jury, the government

bears a heavy burden to show that no prejudice resulted thereby, United States v. Forrest, 620 F. 2d 446, 457 (5th Cir. 1980); United States v. Herring, 568 F. 2d 1099 (5th Cir. 1978); Morgan v. United States, 399 F. 2d. 97. Of course, this court has been holding for nearly one hundred years that when such contact has occurred a juryman may testify about the facts but whether they influenced his decision or not is a matter for sound judicial interpretation. Mattox v. United States, 146 U.S. 140, 13 S. Ct. 50, Led. 917 (1892).

In point of fact, the same court of appeals previously found prejudice from anonymous phone calls "in behalf" of a defendant to a juror sufficiently prejudicial to grant a Habeus Corpus from a state court conviction. See Stomack v. Texas, 548 Fed. 2d 588 (1977); U. S. v. Howard, 506 F. 2d 865 (5th Cir. 1975).

To summarize, it came to the attention of the trial court that impermissible contact of the worst possible kind occurred during the very jury deliberation process. It is impossible to logically state that an anonymous "bribe" offer didn't prejudice a juror against a defendant's innocence. If this type of conduct is allowed to stand unchallenged, it is difficult to imagine what would be "prejudicial" to

a defendant. This opinion is totally out of line with all of the prior decisions by this Circuit and effectively changes the whole spirit of this Court's pronouncement's heretofore about impermissible conduct pertaining to a jury in a criminal matter. This opinion if followed is totally destructive of a petitioner-defendant's right to a Sixth Amendment trial by impartial jury in the manner required by due process. If this decision is allowed to stand but not followed then, obviously a manifest injustice has been done to this single petitioner (and his co-defendant as well) with full judicial knowledge. Either result is intolerable for in the constitutional sense, trial by jury implies at the very least that all the evidence against a defendant come from the witness stand if this court is to continue its unswerving prior commitments to that principle, Turner v. Louisiana, 379 U.S. 466, 85 S. Ct. 546, 13 Led. 2d. 424 (1965); Parker vs. Gladden, 385 U.S. 363, 87. S. Ct. 468, 17 Led. 2d 420 (1966).

Secondly, not only does this case go to the very root of all criminal proceedings, as fair jury, it also stands as a vehicle for the enforcement of 28 U.S.C. Sec. 753, sometimes referred to as the Court Reporter's Act when specific prejudice results from a

failure to provide by its provisions, United States v. Long, 419 F. 2d 91 (5th Cir. 1969); United States v. Smith, 591 F. 2d 1105, 1109, (5th Cir. 1979); United States v. Brumley, 560 F. 2d at 1281.

It would be perhaps outside of the scope of this writ to go into the myriad of evidentiary problems created by the playing of portions of certain recorded conversations as substantive evidence against the petitioner. Since all of them were either prior to or subsequent to the matter charged in the indictment, their very admissibility vel non was questioned. Fully half of the trial was concerned with playing their contents.

Yet, the transcript on appeal does not contain one word of one recording although thousands were played over objection to the jury. No attorney could properly present all the asserted errors whether he was present at the trial or not. In short, half the evidence isn't in the transcript. Not only was a fair trial by jury denied but also a fair appellate presentation was prejudicially abridged.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari has been mailed, postage prepaid, this the 22nd day of January, 1982, to:

The Solicitor General
Department of Justice
Room 5614
Washington, D. C. 20530

/s/ Arthur J. Hanes, Jr.
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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT B

NO. 81-7041

UNITED STATES OF AMERICA,

Plaintiff-Appellee

versus

ROBERT HUGH CARNEY,
CHARLES NEWMAN GAULT,

Defendants-Appellants.

Appeal from the United States District Court
For the Northern District of Alabama

(December 1, 1981)

Before HILL, Circuit Judge, SMITH**, Judge, and

HENDERSON, Circuit Judge.

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*Former Fifth Circuit case, Section 9(1) of Public Law 96-452-October 14, 1980.

**Honorable Edward S. Smith, Judge for the U. S. Court of Claims, sitting by designation.

PER CURIAM:

Robert H. Carney and Charles N. Gault were indicted, along with others,for offenses relating to seven stolen vehicles. Both appeallants were charged in seven counts of receiving stolen vehicles under 18 U.S.C. §2312. After a jury trial, they were convicted on all but two of the counts for receiving stolen vehicles. On appeal, they assign as error (1) the exclusion of portions of two taped conversations, (2) the court reporter's failure to transcribe the tapes as they were played to the jury, (3) the prosecutor's reference during final argument to matters allegedly not in evidence, and (4) two incidents of purported improper conduct by and contact with jurors. Finding no reversible error, we affirm.

The acts for which the appellants were indicted and ultimately convicted occurred during the period from January 26, 1979 to April 16, 1979. They allegedly received stolen vehicles, stripped parts which could not be traced, and removed identifying features such as VIN numbers, and "track sheets" secreted in and on body parts. They then rebuilt, or "kitted" the vehicles for resale, using numbered parts for which they held a title. The government made contact with the appellants through a confidential informant, Delmus Wayne Holcomb, and ob-

served the operations using aerial photography.

Agents of the Federal Bureau of Investigation taped four conversations between Holcomb and the appellants and others on December 9 and 11, 1978, and May 2 and June 2, 1979. During the trial, the district court excluded portions of the December 9th and 11th communications, and the entire June 2nd contact, in an effort to conserve time. Much of the conversation on the December 9 and 11 tapes was with other persons and about other vehicles, and was not directly related to the issues before the jury. Those portions of the tapes which were played in the presence of the jury were not transcribed by the court reporter. During the presentation of the government's case, Holcomb testified that Gault had formerly participated in a "chop shop" undertaking at C & C Motors in Birmingham. Carney was connected to this operation by photographs of his truck parked at the C & C lot, as well as by his statements during a taped conversation with Holcomb. The prosecutor referred to this evidence during final argument in the following manner:

> The evidence doesn't show that they accidentally received those vehicles.

> The evidence shows that they have been in the business of receiving stolen cars all along. And the only reason they came to Wayne, because their other operation got shut down. They are not here by accident.

This argument was objected to as being "prejudicial."

The jury deliberated during portions of two days. On the first day, it voted to convict on two counts of receiving stolen vehicles. That night, a juror who had an unlisted telephone number was contacted by phone with an offer of money if he would "see to it" that Gault was not convicted. The next morning the jury resumed its deliberations, and proceeded to acquit the appellants on two receiving counts and to return verdicts of guilty on the remaining counts. This telephone call was called to the trial judge's attention after the verdict was returned. The judge questioned each juror individually. The juror who received the call stated that he had an unlisted telephone number. He received the call at 11:00 o'clock p. m.,; the caller mentioned Gault, and said that he would make it worth the juror's while if Gault was acquitted. The juror did not tell any of the other jurors about this call. He testified that

his contact with the unknown caller did not affect his deliberations or his vote.

The testimony of two other members of the jury indicates the possibility of two other irregularities in the jury's deliberation process. The foreman stated that some of the jurors appeared to have reflected overnight on the verdicts which were reached on the first day, in his judgment because the jurors appreciated the importance of their decision on the appellants' futures. A third juror testified that he "thought" there must have been" a call made to another juror. Upon further questioning, he stated that a member cf the jury from Birmingham had told him that he went by the place which he thought to be the location of C & C Motors. The appellants' attorney questioned the third juror, but did not attempt to have him elaborate, or to determine which other juror had made the statement. He did not request the judge to pursue the matter in an effort to determine the identity of the Birmingham juror, or to discover what had actually transpired.

The appellants' first contention is based on Fed. R. Evid. 107. They maintain the tapes of the December 9th and 11th conversations should have been

played back at their entirety, if they were to be introduced at all. 1/

At the trial, they objected to the deletions because the expunged portions would assist the jury in identifying the voices of speakers on the tape. The trial judge excluded the evidence on the authority of Fed. R. Evid. 403, stating that its probative value was substantially outweighed by considerations of undue delay and waste of time. He did not permit the appellants to present contemporaneously a portion of the December 11th tape represented by three pages of transcript, without waiving their objection to the elimination of the remainder. This part was played to the jury. The court also offered the appellants the opportunity to use the excluded portions of the tapes during the presentation of their own case, but they failed to do so.

The purpose behind the rule of completeness expressed in Fed. R. Evid. 106 8s, as at common law, to

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1/ Fed. R. Evid. 106 provides:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

prevent confusion or misleading impressions which would result from the introduction of only part of a writing or recording. United States v. Cochran, 499 F. 2d 380, 386-87 (5th Cir. 1974), cert. denied, 419 U. S. 1124, 95 S. Ct. 810, 42 Led. 2d 825 (1975); accord, United States v. Rubin, 609 F. 2d 51, 63 (2d Cir. 1979), aff'd, 449 U.S. 424, 101 S. Ct. 698, 66 L. Ed. 2d 633 (1981); United States v. Jamar, 561 F. 2d 1103 (4th Cir. 1977); see Tappan v. Beardsley, 77 U.S. (10 Wall.) 427, 19 L. Ed. 974 (1870). If the partial recording as introduced is misleading or could cause confusion, the adverse party may require the introduction of any other party reasonably necessary to be considered contemporaneously therewith. Accord, United States v. Weisman, 624 F. 2d 1118 (2d Cir. 1980), cert. denied, 101 S. Ct. 209, 66 L. Ed. 2d 91 (1980). The rule does not dictate that the "whole" of a writing or recording be introduced, however. "No more of the remainder of the utterance than concerns the same subject, and is explanatory of the first part, is receivable." 7 J. Wigmore, Evidence §2113, at 656 (J. Chadbourn rev. 1978); see United States v. Littwin, 338 F. 2d 141 (6th Cir. 1964), cert. denied, 380 U.S. 911, 83 S. Ct. 896, 13 L. Ed. 2d 737 (1965); United States v. Kravitz, 281 F. 2d 581, 587 (3d Cir.

1960), cert. denied, 364 U.S. 941, 81 S. Ct. 459, 5 L. Ed. 2d 372 (1961); United States v. Dennis, 183 F. 2d. 201, 229-30 (2d Cir. 1950) (L. Hand, J.), aff'd, 341 U. S. 494, 71 S. Ct. 857, 95 L. Ed. 1137 (1951); cf. United States v. Paquet,, 484 F. 2d 208, 211-12 (5th Cir. 1973) (versions of conversation).

The appellants here do not argue that the portions of the tape recordings which were played to the jury were misleading in substance, or that the subject of the conversations was unclear. They assert only that the jury might have been aided in identifying the voices of the speakers. Given this objection, it is not clear that the appellants fall within Fed. R. Evid. 106 in the first instance. Such evidence is in any event not immune from scrutiny under Fed. R. Evid. 403.[2/] The district court acted well within its necessarily broad discretion to admit or exclude evidence under the latter rule, Ramos v. Liberty Mut. Ins. Co., 615 F. 2d 334,

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2/ Fed. R. Evid. 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

340 (5th Cir. 1980), clarified, 620 F. d 464 (5th Cir. 1980), cert. denied sub nom. Rucker Co. v. Shell Oil Co., 101 S. Ct. 921, 66 L. Ed. 2d 840 (1981). The court carefully considered the amount of time required to play the excised parts, and weighed it against the probative value of the evidence. United States v. Renfro 620 F. 2d 497, 500-01 (5th Cir. 1980), cert. denied,101 S. Ct. 321, 66 L. Ed. 2d 149 (1980); United States v. Peden, 556 F. 2d 278, 280-18 (5th Cir. 1977) cert. denied, 434 U.S. 871, 98 S. Ct. 216, 54 L. Ed. 2d 150 (1977); see United States v. Price, 617 F. 2d 455, 460 (7th Cir. 1980); United States v. Dwyer, 539 F. 2d 924, 928 (2d Cir. (1976). The trial judge did not abuse his discretion.

The appellants' second ground of error complains of the court reporter's failure to record the tapes as they were played to the jury as required by 28 U.S.C. §753 (b). It is true that this section imposes a mandatory duty upon district courts. United States v. Garner, 581 F. 2d 481 (5th Cir. 1978); United States v. Brumley, 560 F. 2d 1268, 1280 (5th Cir. 1977). Because of the ease with which this requirement can be met, and the potential for prejudice, this court has had occasion in the past to criticize the failure of the trial courts

to report criminal trials in their entirety. United States v. Smith, 591 F. 2d 1105, 1109 (5th Cir. 1979); United States vs. Brumley, 560 F. 2d at 1281 (bench conference). However, the failure to record even evidence at the trial is not prejudicial error per se. United States v. Mendoza, 574 F. 2d 1373 (5th Cir. 1978). cert. denied, 494 U.S. 988, 99 S. Ct. 585, 58 L. Ed. 2d 661 (1978); Strauss v. United States, 311 F. 2d 926 (5th Cir. 1963), cert. denied, 373 U.S. 910, 83 S. Ct. 1299, 10 L. Ed. 2d 412 (1963). Where, as here, the same attorney represents the defendant both at the trial and on appeal, there must be a showing of specific prejudice to the defendant's appeal. United States v. Taylor, 607 F. 2d 153 (5th Cir. 1979), appeal after remand, 631 F. 2d 419 (5th Cir. Unit A. 1980); United States v. Smith, 591 F. 2d at 1109; United States v. Long, 419 F. 2d 91, 94 (5th Cir. 1969). No prejudice, still less any specific prejudice, has been demonstrated in this case. The tapes are a part of the record on appeal. See United States v. Craig, 573 F. 2d 455, 480 n. 27 (7th Ci 1977), cert. denied, sub nom. North v. United States, 439 U.S. 820, 99 S. Ct. 82, 83, 58 L. Ed. 2d 110 (1978). The transcripts of the tapes, both complete transcripts and others containing

those portions of the tapes heard by the jury, are also part of the record. Although the government's transcript is not necessarily a substitute for a court reporter's notes, cf. United States v. Taylor, 607 F. 2d at 154, (charge of trial court), where the accuracy of the transcript is not challenged, its presence in the record will suffice.[3/] The appellants urge now only that there "may have been" some error which this court is now unable to review. To the contrary, we have reviewed the unchallenged transcripts of the tapes, and find no reversible error in the admission of the contents of the tapes.

The appellants objected to the prosecutor's remarks relating to the Birmingham operations during closing argument as being "prejudicial." Assuming that this objection preserved the appellants' right to assert on appeal that the statement was not supported by

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3/ The appellants objected at trial to the introduction of the tapes and transcripts on several grounds, but objected in the alternative that if the tapes were used at all, they should be played in their entirety. The objections to introduction have not been preserved on this appeal, and we consider only the contention that the entire tapes should have been admitted into evidence.

evidence in the record, the argument is without merit.4/ There was evidence in the record to sustain the prosecutor's statement. United States v. Dorr, 625 F. 2d 693 (5th Cir. 1980). The prosecutor's remarks were not made in an inflammatory fashion. See Hall v. United States, 419 F. 2d 582 (5th Cir. 1969).

When there is evidence of an impermissible contact with the jury, the government bears a heavy burden to show that no prejudice resulted from the off-the-record conversation, and that the jury's verdict was not affected by the event. United States v. Forrest, 620 F. 2d 446, 457 (5th Cir. 1980), appeal after remand, 649 F. 2d 355 (5th Cir. 1981). The trial judge impliedly found that no prejudice occurred as a result of the telephone call to the juror. He had no occasion to make an express finding to this effect, since no motion for a mistrial was made either before or after the court and

4/Whether the objection preserved the right to appeal on any gound other than plain error, see Fed. R. Crim. P. 52(b), is questionable. This circuit has recently noted that evidence or argument may well be "prejudicial" in that it damages the defendant's case. What is required, however, is a demonstration of unfair or undue prejudice. See Washington v. Watkins, 655 F. 2d 1346, 1360 (5th Cir. Unit A 1981). Even though this court has often referred to a prosecutor's arguments as "prejudicial" for purposes of analysis, an objection based upon that ground alone seldom advises the trial judge of the specific reason for the exclusion of the statement.

counsel questioned jurors. The decision to declare a mistrial is within the sound discretion of the trial court, and will be reversed only for an abuse or discretion. United States v. Reyes, 645 F. 2d 285 (5th Cir. Unit A 1981); United States v. Buchanan,633 F. 2d 423 (5th Cir. Unit A 1980), cert. denied, 101 S. Ct. 1984, 68 L. Ed. 2d 301 (1981); United States v. Johns, 615 F. 2d (5th Cir. 1980); Morgan v. United States, 399 F. 2d 93, 97 (5th Cir. 1968), cert. denied,393 U.S. 1025, 89 S. Ct. 635, 21 L. Ed. 2d 568 (1969). The trial court followed the procedure for investigating misconduct relating to a jury which have been approved by this court on numerous occasions. See, e.g., United States v. Herring, 568 F. 2d 1099 (5th Cir. 1978); Morgan v. United States , 399 F. 2d at 97.

Also, no prejudice resulted from the juror's view of the premises at C & C Motors, assuming that it in fact occurred. Although given an opportunity to interrogate the jury on this point, the appellants did not endeavor, and did not request that the court attempt, to identify the juror who had allegedly pursued his own investigation. The appellants' argument is thus predicated upon hearsay evidence concerning apparently innocuous conduct. Under such circumstances, we will neither

reverse nor remand for further inquiry. See United States v. Baker , 609 F 2d 134 (5th Cir. 1980); Khoury v. United States, 539 F. 2d 441 (5th Cir. 1976), cert. denied, 429 U.S. 1040, 97 S. Ct. 939, 50 L. Ed. 2d 752 (1977).

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT*

No. 81-7041

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERT HUGH CARNEY,
CHARLES NEWMAN GAULT,

Defendants-Appellants,

Appeal from the United States District Court
for the Northern District of Alabama

ORDER:

( ) The motion of appellant, Robert Hugh Carney for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

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*Former Fifth Circuit case, Section 9 (1) of Public Law 96-452-October 14, 1980.

( ) The motion of appellant, Robert Hugh Carney for stay in the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including January 25, 1982, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The Motion of _____ for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____ for a further stay of the issance of the mandate is DENIED.

/s/ Albert J. Henderson
UNITED STATES CIRCUIT JUDGE